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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1975

No. 75-1532

JOHN HECHINGER, *et al.*,
Appellants,

v.

DR. ROBERT MARTIN, CHAIRMAN,
DISTRICT OF COLUMBIA BOARD OF
ELECTIONS AND ETHICS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO DISMISS OR AFFIRM

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For the reasons set forth below, appellee Board move the Court to dismiss the appeal herein or, alternatively, to affirm the order entered on March 24, 1976, in the above-entitled cause on the ground that the question presented is so insubstantial as not to require further argument.

QUESTION PRESENTED

Appellee Board does not agree that the record in this case will support the questions for review as given by

the appellants, but believes the record more adequately supports the following question:

> WHETHER THE CONSTITUTION REQUIRES THAT THE POLITICAL PARTY WITH THE MAJORITY OF REGISTERED VOTERS MUST HAVE THE RIGHT IN AN ELECTION FOR A MULTI-MEMBER BODY TO ELECT ALL THE MEMBERS OF THAT BODY.

CONSTITUTIONAL PROVISIONS, AND LOCAL STATUTES INVOLVED

Appellants have set forth the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

1. *The Parties.* Appellants Hechinger, Huff, Lewis, Dulcan and Berenson are affiliated Democrats in the District of Columbia. Appellant Democratic Central Committee is the District of Columbia's local Democratic party organization. Appellee-Intervenor Republican Committee is the District of Columbia's local Republican organization. Appellee-Intervenor Jerry A. Moore, Jr. is an affiliated Republican who was elected on November 5, 1975 to one of four at-large seats on the District of Columbia Council. Appellee-Intervenor Rich is an unaffiliated voter who was defeated in his bid for one of the four at-large seats on the Council in the election of November 5, 1975. Appellees Martin and Chapman are chairperson and members respectively on the District of Columbia Board of Elections and Ethics.

2. *The Appellants' Contentions.* The challenged statutory provisions, 401(b)(2) and 401(d)(3) of the District of Columbia Self Government and Governmental Reorganization Act, prohibit a political party from occupying 100% of the seats (memberships) on the Council

of the District of Columbia. Appellants contend that these provisions are unconstitutional on various grounds and urge that the question of its constitutionality is of sufficient substantiality to require plenary consideration by this Court.

3. *Background of Challenged Provisions.* Varieties of 'home rule' legislation for the District of Columbia have been considered by Congress over the years. *See* S. Rep. No. 93-219, 93d Cong., 1st Sess. 3 (1973). The legislation that evolved into the District of Columbia Self Government and Governmental Reorganization Act was itself the subject of extensive consideration and debate.

In June 1973, the Senate District Committee reported S. 1435, which provided for an eleven member Council, made up of eight members to be elected from the wards and two members to be elected at large in partisan elections. S. Rep. No. 93-219, 93d Cong., 1st Sess. 5, 12 (1973). The bill was passed by the Senate in this form.

By comparison, the companion legislation introduced in the House, H.R. 9682, provided for a thirteen member Council, with eight ward members and five at large members (including the Chairman). The House bill included, and was reported by the House District Committee with, the 'minority party' clause which provided that not more than two of the at large members (other than the Chairman) could be nominated by any one party. H.R. Rep. No. 93-482, 93d Cong., 1st Sess. 8 (1973). However, even this modified partisan election procedure was objected to by dissenting members of the House Committee, who felt that because of the interweave of federal and local interests in the District, and because of the extremely large number of federal and District employees in the District who are barred from partisan political activity by the Hatch Act, the Council election should be

completely nonpartisan.[1] This would have the advantage, they said, of permitting federal employees to 'take an active part in the campaign of a nonpartisan candidate for the local offices.' *Id.* at 145-46.

The views of the Committee minority prevailed on the Floor of the House, and H.R. 9682 was amended and passed by the House to provide for completely nonpartisan Council elections. 119 Cong. Rec. H. 8856 (daily ed. October 10, 1974).

After a lengthy House-Senate conference, the inconsistency between the House and Senate bills was resolved by adopting the minority representation provision originally included in H.R. 9682. H.R. Rep. 93-703, 93d Cong., 1st Sess. 13 (1973). In presenting the Conference Report to the House, the Chairman of the House District Committee characterized this feature of the Report as 'the single most important difference' between the two bills. While supporting the concept of partisan elections, which was insisted upon by the Senate Conferees, he stated that the compromise 'built into the partisan provision a protection of minority interests'—a protection he characterized as 'fair and equitable.' 119 Cong. Rec. H. 11509 (daily ed. Dec. 17, 1973) (remarks of Rep. Diggs).[2]

The chairman of the Senate District Committee similarly explained to the Senate that the compromise version of the bill 'guaranteed minority party representation' on the Council. 119 Cong. Rec. S. 23375 (daily ed. Dec. 19, 1973) (remarks of Sen. Eagleton). While one Committee member nevertheless voiced concern that as many as 40% of the registered voters in the District

[1] The dissenters pointed out that 63 of the 100 largest cities in the U.S., and 60% of the cities with populations over 100,000, conduct nonpartisan elections.

[2] Even this compromise did not satisfy certain of the dissenters on the House District Committee, who still viewed the Act providing for completely partisan elections. 119 Cong. Rec. H.11517-18 (daily ed. Dec. 17, 1973) (remarks of Rep. Broyhill).

would still be foreclosed by the Hatch Act from full participation in Council election, he nevertheless voted in favor of the compromise. *Id.* at S. 23382 (remarks of Sen. Domenici). The Conference compromise was ultimately approved and it became law.

ARGUMENT

1. THE COURTS, INCLUDING THIS COURT, HAVE CONSISTENTLY HELD THAT MINORITY REPRESENTATION STATUTES SUCH AS THE ONE CHALLENGED HERE ARE CONSTITUTIONAL.

The issue in this case has been decided consistently by earlier decisions of this court. There are no conflicts between the decision below and any other court decision.

A comparison of arguments and authorities advocated by Appellants in their Jurisdictional Statement and the District Court decision (JS 1a) compells the conclusion that the District Court treated fully each argument, considered carefully each authority, and unanimously rejected Appellants' position. The District Court weighed and tested each contention of Appellants by every conceivable means—(a) the language of the provisions (JS 2a); (b) the legislative history (JS 3a); and the purposes of the provisions (JS 3a). The District Court conscientiously scrutinized Appellants' authorities and brief. After this intensive examination, the District Court reached the same rational and well-founded conclusion as was reached by this Court in *Buckley*, et al. v. *Valeo, Secretary of the United States Senate*, et al. 44 U.S.L.W. 4127, when this Court rejected absolutism of First Amendment rights and/or other constitutional rights as being absolute per se.

The Court below stated, on page 4(a) of Appellant's jurisdictional statement the following:

"No one serious contests the fundamental nature of the rights claimed by plaintiffs under the First Amendment, and the Supreme Court has in fact articulated the concept on many occasions—most recently in Buckley, et al. v. Valeo, Secretary of the United States Senate, et al., 44 LW 4127 (January 30, 1976).

But this latest expression from the Supreme Court appears to meet in a somewhat head-on fashion all of plaintiffs' claims in this regard.

'The Court's decisions involving associational freedoms establish that the right of association is a basic constitutional freedom' that is 'closely allied to freedom of speech, lies at the foundation of a free society.' Kusper v. Pontikes, 414 U.S., at 57; Shelton v. Tucker, 364 U.S. 479, 486 (1960). See, e.g. Bates v. Little Rock, 361 U.S. 516, 522-523 (1960); NAACP v. Alabama, 357 U.S., at 460-461; NAACP v. Button, 371 U.S., at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' NAACP v. Alabama, supra, at 460-461. Yet, it is clear that '[*n*]*either the right to associate nor the right to participate in political activities is absolute.' Civil Service Comm'n.* v. *Letter Carriers, 413 U.S. 548, 567 (1973) Even a '"significant interference" with protected rights of political association' may be sustained* (italicizing added by Appellee Board), if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. Cousins v. Wigoda, 419 U.S., at 488; NAACP v. Button, supra, at 438; Shelton v. Tucker, supra, at 488." 44 U.S. LW at 4134.

We think that the Congress' interest in facilitating some representation of political minorities on the

City Council of the nation's capitol is a valid one, sufficiently important to warrant the challenged interference with the rights of political association, and that the means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgment of those rights.

But for the restriction of the challenged sections the majority party (Democratic at present) would be able to elect all of its candidates to the council, thus leaving a minority without any input into council activity. The concept of minority representation, or stated in another fashion, limitations on majority representation, is entirely consistent with First Amendment principles of freedom of expression and association, and appears altogether legitimate as a legislative objective. Various schemes for accomplishing the purpose of such legislation, including measures identical, or nearly so, to the sections here challenged have been examined in the light of constitutional standards and declared to be valid."

The concept of minority representation under the actual facts of the case before this court involves at best only minimal participation, when one observes that two seats (members) out of 13 equals only about a 15% shortfall (participation) or no more than a possible maximum of about 85% control (by the Democrats who measure 76.55% of the registered voters). There are no measures, parliamentary or procedural requirements of the Council that require more than a 66% vote to secure an absolute exercise of a group's will on an enactment or procedure.

This Court in *Williams* vs. *Rhodes*, 393 U.S. at 34, stated:

> "the number of voters in favor of a party, along with other circumstances, is relevant in considering whether state laws violate the Equal Protection

> Clause. And, as we have said, the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors. But here the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause."

But here the totality of the District of Columbia restrictive laws taken as a whole imposes no burden on voting and associational rights which might could be an invidious discrimination in violation of the Equal Protection Clause.

Admittedly, minority representation dilutes the vote of the majority since to protect the minority the full effect of the majority vote is not permitted. But without minority representation, the vote of the minority is not only diluted, but it may be worthless, at least insofar as securing party representation is concerned. Congress could have legislated nonpartisan elections, however, it must be further noted that under the District of Columbia scheme, there is no guaranteed *minority party representation* at all. As a matter of fact four independents could win. We feel it is neither anti-democratic nor anti-majoritarian to limit the power of a bare majority to secure political representation in excess of its actual strength at the polls.

The Supreme Court has often recognized that the states should be afforded flexibility to tailor viable local governmental structures to meet their particular needs. (Congress could have legislated nonpartisan elections). Hadley v. Junior College District, supra 397 U.S. at 59, 90 S. Ct. 791, Avery v. Midland County, 390 U.S. 474, 485, 88 S. Ct. 1114, 20 L Ed 2d 45 (1968); et al. See also Blaikie v. Wagner, 250 F Supp 364 (S.D. N.Y. 1965).

The idea of guaranteeing minority representation in legislatures and local government bodies is by no means new and has been considered and upheld by various federal courts including the Supreme Court.

In fact, majority control is not the rule in many contexts. The State of West Virginia, *Gordon v. Lance*, 403 U.S.l., 91 S.Ct. 1889, 29 L.Ed. 2d 273 (1971), has a constitutional and statutory requirement that 60% of the voters in a referendum must approve an increase in bonded indebtedness or tax rates beyond those established by the state constitution. The Supreme Court upheld this requirement declaring it not violative of the Fourteenth Amendment and further saying: 403 U.S. at 6:

> ". . . But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris*, 385 U.S. 231 (1966)."

The Charter of New York City provides for the system of "limited voting" in order to select 10 councilmen at large for New York City's Council. This system provides for two councilmen to be elected from five boroughs and limits "each voter to vote for a single borough—wide candidate, also providing that a party (or independent body) may nominate only one candidate for councilmen at large in each borough, "see *Blaike v. Power*, 13 N.Y. 2d 134, 193 N.E. 2d 55 (1963) *appeal dismissed for want of a substantial federal question*, 375 U.S. 439 (1964).

This system of voting was approved by the voters of New York City which is similar to the overwhelming approval by the voters of the District of Columbia of minority representation on the Council.

The New York case is not distinguishable from our case even though there is statement that in New York the independent bodies face the same nomination restriction in the "limited voting" system in New York City as the political parties and, therefore, this fact distinguishes this case from ours. However, "independent body" as defined in New York election law has a different meaning than an independent candidate for our "at large" seats on the Council of the District of Columbia. In New York, the statutory definition of an "independent body" refers to an "organization or group of voters" which nominates a "candidate or candidates" for office. This definition does not include the independent candidate for the Council of the District of Columbia. Therefore the independent which the plaintiffs claim is included under the restrictions of the New York statute is not the same type of independent which exists under District law. An independent in the District represents himself and is not part of an organized group which places candidates on the ballot. Therefore, using a District of Columbia definition for an independent, this candidate would not be subject to the restriction placed on political parties in New York.

A second state which has a minority representation statute is Connecticut and a three judge court with Judge J. Joseph Smith writing the opinion upheld the constitutionality of this procedure as it applies to local school boards. See *LoFrisco v. Schaffer*, 341 F. Supp 743 (D. Conn. 1972) *aff'd per curiam*, 401 U.S. 972 (1972). In *LoFrisco*, the plaintiff was, *inter alia*, challenging the limitation placed on a town committee or caucus allowing it to nominate only as many people as one elector

can vote for at the polls. Since electors can vote for only half of the vacancies on the board if an even number are being selected or for a bare majority if an odd number are being selected, this restricts the number of party nominees.

In *Hechinger*, restrictions are placed on all political parties, and independent groups which put up two or more candidates fall under the same restrictions. Therefore, it is only the truly independent candidate, not affiliated with any organization which puts up candidates for other at large seats, which is exempt from the restriction in the District of Columbia. There is no practical reason why a truly independent candidate without the resources of an established, political organization should be placed under the same restrictions as that of an organization.

The Supreme Court in *Gaffney v. Cummings*, 412 U.S. 735 (1973) observed that a redistricting plan could use a "political fairness principle" in making up Senate and House Districts for the state legislature of Connecticut. In that case, a three-member Board designed new legislative districts for the State after the decennial census. In drawing up the districts, the Board drew up a plan which would achieve a rough approximation of the statewide political strengths of the Democrats and Republican Parties. The Court, after declaring the deviations in population presented by the plan to be acceptable, made the following statement concerning the intentional approximation of party strength by the Board: 412 U.S. at 753:

> . . . The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats . . .

The "political fairness principle" in *Gaffney, supra*, is similar to that in *Hechinger*. In the instant case the

Congress designed the Council knowing that it was assuring minority party representation but also knowing that the system required approval by the voters. It is evident from *Gaffney* that this action does not violate constitutional standards of Equal Protection.

It is obvious that the restriction on two Council seats is certainly in line with the above cases and does not violate Equal Protection Standards as outlined by these cases. This minimal restriction was designed by Congress with the overwhelming approval of the voters of the District and it has had little impact on the structure of political parties in the District of Columbia.

Protection of minority interest comports with the views of our founding fathers as found in the Federalist Papers. This protection of minority interest is characterized by the House District Committee Chairman, a Democrat, as "fair and equitable." 119 Cong. Rec. H. 11509 (daily ed. Dec. 17, 1973) (remarks of Rep. Diggs).

There is perhaps no more eloquent expression of this concern than The Federalist No. 51, the authorship of which has been variously attributed to Alexander Hamilton and to James Madison. In speaking of the role of the federal system in preserving the peoples' liberties, the author stated principles of political philosophy which are equally persuasive of the necessity of maintaining a diversity of parties within the legislature:

> "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority . . . The second method will be exemplified in the federal republic of the United States."
>
> *The Federalist*, Jacob E. Cooke (Middletown, Conn. 1961) 351

Again and again this view was expressed in various ways by the authors of the Federalist Papers. See, for example, Number 26 at 168, Number 50 at 346-6, and Number 70 at 475 (all page references are to *The Federalist*, supra.)

The debate over the philosophy and structure of the new nation found its fruition in the Constitution which, of course, contains many obstacles to rule by the majority; it is singularly ironic that the Appellants now invoke this document to strike down the modest restraint contained in the Act, which still leaves their party, which represents only 76.5 percent of the registered voters, with a 84.9 percent of the actual voting power (11 out of 13 seats) on the District of Columbia Council. The actual number of Democrats voting the Primary Election of September 10, 1974, fell much short of 50% of the registered Democrats. Therefore it is fair to submit that their actual council voting power, even following the application of the restrictions of the Act, far exceeds the percentile of registered Democrats who elected in the primary their party colleagues.

We note further that appellants contend that the restrictions amount to 50% of at large seats on the Council. Whereas this is true nevertheless, we submit that the proper focus is upon the Council as a single entity. As a legislative body composed of 13 members representing

all residents, those registered to vote as well as those not registered. Each member of the Council from a ward or at large has the same vote that each of the other has and the quorum requirement of the Council to do business treat both the ward and at large Council members equally.

2. THERE IS NO DISCRIMINATION IN FAVOR OF INDEPENDENTS.

The Appellants make one attempt to distinguish the District of Columbia minority representation provisions from those which have been consistently upheld by the courts in other cases. The Appellants claim that the District of Columbia Act violates the Fifth Amendment by creating an invidious discrimination in favor of independents. The gist of Appellants' claim is that the Act, while allowing any single party to hold just eleven of the thirteen city council seats, permits independents, at least theoretically, to be elected to all thirteen seats.[3]

In advancing that claim, however, the Appellants, as the court below stated, "fundamentally misunderstand the concepts involved." (JS at 10a).

In the District of Columbia, the term "independent" is not a party or organizational label. Independent candidates and voters are not a single, cohesive mass. On the contrary, independents are not only independent from the established political parties, *they are also independent from each other.* Each independent candidate, after obtaining *on his own* the requisite number of signatures

[3] It deserves emphasis that the Act restricts the number of seats which may be held by any *single* party. There is no limitation on the number of seats which may be held by various parties. In fact, all members of the council were elected as members of a political party. Eleven are Democrats, one is Republican and one is a member of the Statehood Party. No independent candidate gained election to the council in the 1975 elections.

to be placed on the ballot, stands for election individually. He stands alone. By the very nature of his candidacy, an independent candidate is restricted to nominating and electing but one candidate—himself. Any further restriction is, by definition, unnecessary.

Moreover, under District of Columbia law, the moment a candidate chooses not to run independently, but decides to form or become a part of an organization putting forth a slate of candidates under the label of that organization—regardless of the name that organization adopts, whether it be the Democratic Party, the Republican Party, the Statehood Party, or the Capitol City Republican Club—he becomes the candidate of a political party and subject to the restrictions placed by the Act on political parties.[4] So long, however, as a candidate remains independent and chooses to run as an independent, he is not expressly restricted by the Act. He is already restricted by his choice to run independently.

[4] A "political party" under D.C. Code § 1-1121(j) is:

> "an association, committee, or organization which nominates a candidate for election to any office and qualifies . . . to have the names of its nominees appear on the election ballot as the candidate of that association, committee, or organization."

In other words, an organization, committee or association which nominates candidates to run *under* its label is a political party and subject to the restrictions of the Act.

CONCLUSION

It is obvious that the provisions challenged here do not violate the Constitution. The minimal restriction set by those provisions was designed by Congress with the overwhelming approval of the voters of the District. It is fully in accord with the restrictions adopted in numerous other jurisdictions which have, without exception, been approved by the courts. The present case presents no substantial issue and this Court should, therefore, summarily dismiss the appeal herein or, alternatively, to affirm the decision below.

Respectfully submitted,

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